Supreme Court, U.
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MICHAEL RODAK, JR.,

No. 80-245

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Petitioner
vs.
LAWRENCE A. SARAUW,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the duty owed by a shipowner under 33 U.S.C. §905 (b) is ordinary care under the circumstances.

2. Whether a shipowner is subject to liability for physical harm to a longshoreman by a condition on the ship if (A) the vessel knows of or by the exercise of reasonable care would discover the condition, and should realize that it involved an unreasonable risk of harm to such longshoreman and (B) should expect that he will not discover or realize the danger, or will fail to protect himself against it, and (C) fails to exercise reasonable care to protect him against the danger.

COUNTER STATEMENT OF THE CASE

According to R. S. Ct. 21 (g) the shipowner is required to include a concise statement of the case containing the fact material to the consideration of the questions presented. Because the shipowner's statement of the case is inaccurate and omits material facts, Sarauw deems the following counter statement of the case necessary to correct such inaccuracies and omissions.

On November 15, 1977 at approximately 2:30 a.m., Sarauw was seriously injured when the gangway fell off the VLCC Andros Atlas. Sarauw was employed as a dock helper for Hess Oil Virgin Islands Corporation and was changing from a small to a large gangway. The change was necessitated by the rise of the ship which was discharging crude oil. Sarauw, operating a crane, was about to place the large gangway upon the ship when he observed a chain blocking the location on the ship where

the gangway was to be placed. He called out to the ship's crew for assistance but received no response. Sarauw descended the large gangway, walked a short distance across the dock and ascended the small gangway to seek assistance. As he ascended part way up the small gangway, it suddenly came off the ship and crashed to the dock. The unsecured condition of the gangway was not denied.

Viewing the evidence and the inferences to be drawn therefrom in the light most favorable to Sarauw, the jury may have found that the gangway was never secured to the ship. The shipowner's numerous allusions to the gangway having been initially secured to the ship upon docking is not supported by the preponderance of the evidence. Such allusions are derived solely from the testimony of the ship's captain whose credibility the jury was entitled to discredit. Neither Sarauw, the ship's second officer or any person in a position to see, saw the gangway secured with rope or chain. The shipowner's view of the evidence and the inferences it draws therefrom prevent a ready and adequate understanding of the points requiring consideration. To describe the evidence relevant to any initial securing of the gangway as uncontradicted and to assert that rope and chain were later removed is misleading.

Furthermore, the shipowner's statement that Sarauw was going aboard to remove the ship's railing and that he denied removing any rope or chain securing the gangway is not supported by the evidence. Sarauw testified that he was going aboard to seek assistance and was never asked whether he had personally removed any rope or chain securing the gangway. These statements attributed to Sarauw are false. Indeed, removal of rope and chain from the gangway by Sarauw was never an issue at trial and to raise such an issue by innuendo before this Court for the first time constitutes misconduct.

ARGUMENT

A. ALTHOUGH IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL, THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

Even though this Court has granted certiorari in *De Los Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Circ. 1979), *cert. granted*, 100 S. Ct, 2150 (1980) (No. 79-512) and petitions filed in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F. 2d 116 (3rd Circ. 1979), *petition for cert. filed*, 48 U.S.L.W. 3374 (U.S. Nov. 23, 1979) (No. 79-813), *Matthews v. Ernst Russ Steamship Co.*, 603 F. 2d 676, (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3274 (U.S. Oct. 15, 1979) (No. 79-624), and *Johnson v. A/S Ivarans Rederi*, 613 F. 2d 334 (1st Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3679 (U.S. April 10, 1980) (No. 79-1587), *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F. 2d 746 (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3323 (U.S. Nov. 1, 1979) (No. 79-706) and *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (9th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3242 (U.S. Oct. 1, 1979) (No. 79-538), the duty of ordinary care under the circumstances adopted by the Third, Ninth, Seventh and First Circuits is consistent with prior decisions of this Court.

In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L Ed 521 (1979) this Court held that although Congress intended to abolish the warranty of seaworthiness as previously applicable to longshoremen, the 1972 amendments to 33 U.S.C. §905 (b) were not intended to change other existing principles of maritime law. This court said at pages 5 and 15:

> "Against this background, Congress acted in 1972, among other things, to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words to overrule Sieracki and Ryan.
>
> In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change."

Prior to enactment of the 1972 amendments, and in negligence actions, this Court had imposed a duty upon shipowners in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed 550 (1959) of ordinary care under the circumstances. This Court said at page 632:

> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."

Where Congress did not act to change the duty of care in 905 (b) actions for negligence, or even considered such changes during debate, the Third Circuit correctly adopted the duty of ordinary care under the circumstances. Such adoption was consistent with existing principles of maritime law and does not encompass unseaworthiness including non-delegable duty. These concepts of strict liability are entirely distinct from negligence. The shipowner's argument that unseaworthiness including non-delegable duty are preserved by the duty of ordinary care under the circumstances is groundless.

B. THE SHIPOWNER'S DUTY OF ORDINARY CARE UNDER THE CIRCUMSTANCES REQUIRES A SAFELY SECURED GANGWAY

The following comments concerning a ship's gangway and a shipowner's duty of care were set forth by the Trial Judge in his Memorandum Opinion filed June 8, 1979 at page 39a of Petitioner's Appendix B.

> "With regard to this case, the evidence has convinced me that a ship's gangway is the 'front door' of the ship. In fact, it may well be the only door. When a ship is swinging on its anchor or tied up to a dock, the gangway is the only means of access short of climbing up the anchor chain or 'hand-over-handing' it on her mooring lines. Thus, once a gangway is put into place, whether the gangway is owned by the ship or by the stevedore, it becomes an integral part of the ship. Good seamanship requires that the gangway be secured. It should be just as firm and secure as the life rail stanchions which border the deck to prevent persons from falling off. It should be just as firm and secure as any other ladder or companionway on board the ship. I cannot imagine that any ship's officer would ever say that 'once we tie up to a dock, the stevedore has sole control and responsibility for the gangway.' True, the stevedore may have the duty to furnish a gangway, or to place it, but the ship's crew, as brought out in the evidence in this case, has the responsibility to see that the ship and gangway are 'secured together as one' so that anyone can board or leave the ship safely."

Indeed, Hess Oil Virgin Islands Corporation acknowledged the shipowner's duty of care during the initial placement of the gangway when it included the following language in an internal Memorandum dated November 21, 1977:

> "Effective immediately, the following procedure is initiated:
>
> Paragraph A, it is the responsibility of the A mechanic to ascertain that gangways and safety nets are properly connected and secured. *The vessel's personnel should be requested to assist making the initial tie down.*" (Transcript pg. 133) (Emphasis added)

And the shipowner's expert described the crew's customary participation in the initial placement of the gangway as follows:

> "Who rigs the gang planks and secured them to the stanchions at Hess Dock No. 3?
>
> Well, generally it is raised by crane, loaded on the ship, *guided into position by the ship's crew.* When it is then landed in position, then the bridle is removed and he will either step aboard and make fast the safety net or return to the dock and *the ship will make fast the safety net.* (Transcript pg. 393) (Emphasis added)

The shipowner's assertion that the Third Circuit's imposition of a duty of care was premised solely on the testimony of Sarauw's expert is not supported by the evidence. Even though the shipowner asserts that the initial placement of the gangway was totally performed by Hess Oil Virgin Islands Corporation, such assertion is contradicted by the shipowner's own evidence. Clearly, the shipowner retained substantial control over the initial placement of the gangway and would have been found to have breached any of the duties of care adopted by the Circuits.

The shipowner's arguments concerning unseaworthiness including non-delegable duty, ownership of the gangway and preventive safety were thoroughly considered and correctly rejected by the Third Circuit in its Opinion filed May 20, 1980 at pages 5a, 6a, 7a and 8a of the Petitioner's Appendix A. These tired arguments represent no more than a continuing effort by the shipowner to avoid liability to persons injured as a result of the shipowner's negligence. Such affliction is shown by the following excerpt from the shipowner's Petition at page 29:

> "Moreover, the rationale of the Third Circuit opinion is susceptible of application to many other situations where 33 U.S.C. §905 (b) applies. This is particularly true in the shipbuilding and ship repair industries, where employees of independent contractors routinely come aboard ship to install, repair, test and operate equipment 'customarily' operated and controlled by the ship's crew."

Where it is customary for the shipowner to participate in the initial placement of the gangway and attendant safety precautions and customary for the shipowner to maintain a gangway watch to ensure continual safety, the unsecured condition of the gangway was a breach of the shipowner's duty of care under the circumstances and ample justification for the jury's verdict in favor of Sarauw. Since the gangway is used by all persons coming on or off the ship including officers and crew, pilots, longshoremen, customs and immigration officers, and suppliers, common sense as well as custom dictates that the shipowner be required to exercise ordinary care under the circumstances to ensure the gangway is safely secured at all times.

C. THE SHIPOWNER FAILED TO ACCURATELY PRESENT A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION

According to R. S. Ct. 21 (5) a petition for certiorari must accurately present a ready and adequate understanding of the points requiring consideration. The shipowner's statement of the case containing inaccurate references to the testimony of Sarauw and omitting references to contradictory testimony of Sarauw and the second officer was false and misleading. Such misconduct required Sarauw to request certification of and transmittal of the Transcript of Testimony to this Court as shown by Respondent's Appendix.

CONCLUSION

Sarauw requests that the Petition for a Writ of Certiorari be denied.

DATED:
September , 1980

SIGNED:

_____

Joseph L. Costello
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the Brief in Opposition were addressed to Robert B. White, Jr., counsel for Petitioner, Rawle and Henderson, 2200 Packard Building, Philadelphia, PA 19102, and deposited in the United States Post Office, Christiansted, St. Croix with first class postage pre-paid.

DATED:
September , 1980

SIGNED:

Joseph L. Costello
Counsel for Respondent

APPENDIX

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LAWRENCE A. SARAUW, Plaintiff	
v.	CIVIL NO. 1978/57
OCEANIC NAVIGATION CORPORATION and VLCC ANDROS ATLAS, Defendants	ACTION IN ADMIRALTY FOR DAMAGES

REQUEST FOR CERTIFICATION AND TRANSMITTAL

Plaintiff requests that the Transcript of Testimony be certified and transmitted to the Supreme Court of the United States pursuant to R. S. Ct. 19 (1) for the reason that the statement of the case in defendants' petition for certiorari fails to accurately present a ready and accurate understanding of the points requiring consideration.

DATED:

LAW OFFICES OF
JOSEPH L. COSTELLO

By_____
Joseph L. Costello, attorney
for plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Request was placed on the mailbox of John F. James in the Office of the Clerk of the Court, District Court, Christiansted, St. Croix, on this day of , 1980.

_____